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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 690

TWENTY-FIVE YEARS OF RAIL BANKING: A REVIEW AND LOOK AHEAD

WRITTEN STATEMENT OF
ARKANSAS ELECTRIC COOPERATIVE CORPORATION

Michael A. Nelson
131 North Street
Dalton, MA 01226
(413) 684-2044

Transportation Consultant

Eric Von Salzen
McLeod, Watkinson & Miller
One Massachusetts Avenue, N.W.
Suite 800
Washington, DC 20001
(202) 842-2345

Counsel for Arkansas Electric Cooperative Corporation

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Pursuant to the Board's notice dated May 21, 2009, Arkansas Electric Cooperative Corporation (AECC) 1/ submits these written comments regarding the impact, effectiveness, and future of rail banking under Section 8(d) of the National Trails System Act (the "Trails Act"), 16 U.S.C. 1247(d). Due to schedule conflicts, AECC will not have a representative at the public hearing on July 8, 2009. However, AECC will monitor

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1/ AECC is a membership-based generation and transmission cooperative that provides wholesale electric power to electric cooperatives, which in turn serve approximately 490,000 customers located in each of the 75 counties in Arkansas. In order to serve its member distribution cooperatives, AECC has entered into arrangements with other utilities within the state to share generation and transmission facilities. The largest of AECC's generation assets are its ownership interests in the White Bluff plant at Redfield, AR and the Independence plant at Newark, AR, each of which typically burns in excess of 6 million tons of Powder River Basin (PRB) coal annually. AECC holds a 35 percent interest in each of these plants (for which Entergy is the operator and majority owner). In addition, AECC holds a 50 percent interest (with American Electric Power) in the Flint Creek plant, which is located at Gentry, AR. This plant normally burns in excess of 2 million tons of PRB coal annually. As a result of the large volume of PRB coal used by these plants and the essential role of rail transportation for these movements, AECC has a direct interest in actions by the Board that affect its rail transportation options.

the webcast of the hearing, and will, as permitted by the Board, submit any supplemental comments needed to address issues that arise at the hearing.

I. COMMENTS

AECC's comments address general issues related to the Board's implementation of the rail banking program in the context of constrained rail infrastructure and other public interest considerations, as well as the specific issues itemized by the Board in its May 21 notice. Comments in both of these areas are presented below.

A. In General: Is Rail Banking Serving Its Intended Purpose?

Section 8(d) of the Trails Act was "the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails." Preseault v. I. C. C., 494 U.S. 1, 9 (1990). Congress was concerned that the mileage of the national rail network had fallen by almost 50% since 1920 (from 272,000 miles to 141,000 miles), and 3,000 more miles were expected to be abandoned every year to the end of the century. 494 U.S. at 5. Through Section 8(d) of the Trails Act Congress addressed the problem of shrinking rail trackage by establishing an alternative to abandonment of rail lines. Legally, abandonment of a line means that it is removed from the national rail network; practically, abandonment means that the assemblage of land that was put together to create the railroad right-of-way may become fragmented into separate ownerships and uses. If changed circumstances in the future produce a renewed need for a rail line in that location, it may be difficult or even impossible to re-establish the line at an economically feasible cost. The Trails Act

alternative allowed railroads to discontinue service on lines that they no longer found profitable to operate, while avoiding abandonment by transferring the line to a trail operator.

Thus, although one purpose of the legislation was to make land available for trails, the "key" element was that "the route itself [would] remain . . . intact for future railroad purposes" and "such rights-of-way [would not be deemed abandoned] for railroad purposes." 494 U.S. at 8 (quoting H. R. Rep. No. 98-28, p. 8-9 (1983)). When the ICC adopted its initial Trails Act regulations, it observed that this legislation would "protect railroad interests" (quoting from the same House Report cited by the Supreme Court) by:

> providing that the right-of-way can be maintained for future railroad use even though service is discontinued and tracks removed, and by protecting the railroad interests from any liability or responsibility in the interim period.

Rail Abandonment - Use of Rights-of-Way as Trails, Ex Parte No. 274 (Sub-No. 13), 2 ICC2d 591; 1986 ICC LEXIS 339,*8 (1986).

Thus, it is clear that promotion of trail use is a secondary purpose of the Trails Act – or, perhaps more aptly, a means to an end. The end is to maintain rights of way for possible restoration to active rail service in the future.

In light of the purposes of the Trails Act, there is a fundamental incongruity that the Board needs to consider as it contemplates the status and future of rail banking. On the one hand, the flow of rail assets into abandonment and rail banking has been significant, and appears to be continuing. During a typical month, the Board issues more than 30 decisions and notices in abandonment cases. Within the past year,

the e-Library portion of the Board's website shows that the Board has received 35 documents labeled as trail use requests, and 14 labeled as trail use agreements.

On the other hand, the rail industry, the Board, and others have, in different ways, advanced concerns that additional rail capacity and infrastructure will be needed to accommodate increasing rail volumes. Even allowing for the likelihood that most rail banking involves low-density lines, it is reasonable to hypothesize that in the nearly 30 years that have elapsed since passage of the Staggers Act, railroads have had an ample opportunity to take unprofitable branch lines out of service. Indeed, with fuel price changes creating increased economic pressure for truck-to-rail conversions, it would not be surprising to find "withdrawals", rather than "deposits", becoming the primary transactions taking place at the "rail bank". In fact, however, the number of lines going into rail banking each year appears to be greater than the total number of rail banked lines (or segments of lines) for which the Board has ever authorized restoration of rail service (nine, according to the Board's May 21 notice).

In the course of considering this dilemma, AECC has become aware of broader issues regarding the process through which rail line segments may enter rail banking, as well as the process through which rail banked lines may be placed back in rail service. These issues raise important economic, competitive, and public interest considerations that warrant careful consideration by the Board.

49 U.S.C. §10905 establishes the basic process that must be followed by a carrier seeking to remove a line segment from the national rail network. Before an abandonment can take place, the line must be subjected to a process through which a

shipper or other outside party may make an offer of financial assistance ("OFA") to subsidize or acquire the line in order to keep it in service. A potential acquiring party may invoke the Board's authority in order to ensure the reasonableness of the terms of a sale, and after a period of 5 years would enjoy an unrestricted right to resell the line to other railroads, including competitors of the original rail owner. All else equal, these terms create a significant incentive for the owner of a line to keep it in service if it is economically viable to do so, at least in circumstances where loss of control over the line to a competitor poses a meaningful threat.

In comparison, the Board's rail banking procedures leave complete control over rail banked assets in the hands of the original owner. The Board does not take a role in the negotiations between the railroad and the potential trail operator to ensure that the terms of the agreement are in the public interest. More significantly, lines placed in rail banking under Board procedures may remain there indefinitely, and the original rail owner retains perpetual veto power over any proposal to restore the line to rail service. Cumulatively, these Board policies – which do not appear to be mandated by the Trails Act or any other applicable statute – provide an opportunity for a rail carrier to place into "cold storage" line segments that, for example, may require maintenance or investment that the carrier wishes to defer.

AECC has already documented for the Board how pressure for short-term financial results has apparently caused railroads in some instances to withhold needed

maintenance activity, even on major facilities like the PRB Joint Line. 2/ The Board should be cognizant of the possibility that its abandonment and rail banking procedures are being compromised for similar reasons.

Specifically, the Board's current rail banking practices may enable railroads to withhold reasonable infrastructure investments, and may interfere with the Congressional intent that market forces be brought to bear when a carrier seeks to remove segments from the rail network. While abandonments in the 1980's frequently involved lines that literally were not used, it is now not unusual to see proposed abandonments that involve lines with multiple active shippers and annual volumes of several hundreds of cars or more. The railroads submit detailed financial analyses that supposedly justify such abandonments. However, those analyses frequently do not differentiate circumstances that may truly warrant abandonment from situations where, for example, the railroad has elected to withhold expenditures on routine maintenance to maximize short-term profits while sacrificing the longer-term viability of the line.

This issue is perhaps most visible in circumstances where an exogenous event has necessitated an embargo of service on a line. If the railroad then elects to pursue an abandonment, its abandonment application provides a "snapshot" of the economic condition of the line that appears to justify its abandonment. Yet the line was in service and not scheduled for abandonment prior to the exogenous event.

2/ See STB Ex Parte No. 431 (Sub-No. 3), Review of the Surface Transportation Board's General Purpose Costing System, "Arkansas Electric Cooperative Corporation's Answers to Board Questions Regarding the Board's Responsiveness" (June 1, 2009), Exhibit B.

Obviously, damage from an exogenous event could be so extensive as to prevent the economic restoration of rail service, particularly on low-density lines. For example, if a long tunnel collapsed in an earthquake, or a major bridge was destroyed in a flood, a rational analysis might reasonably conclude that restoration of rail service was not economically viable.

The problem arises when the economic condition of the line reflects a need for investment unrelated to the damage caused by the exogenous event. This can suggest two specific possibilities – either the railroad had not been performing appropriate maintenance prior to the exogenous event, or the application overstates true investment requirements. Each of these possibilities raises legitimate public interest concerns.

The regular maintenance required to maintain branch lines to minimal operating standards is generally low. Under the Board's analysis procedures, it is "rational" for a railroad to perform such maintenance, as long as the railroad is achieving revenues that more than offset avoidable costs. However, a railroad operating with an excessive focus on short-term results may be tempted to withhold even low levels of maintenance expenditures to improve the appearance of near-term profit.

Overstatement of true investment requirements also supports a posture of minimizing infrastructure investments. Overstated investment requirements lengthen the apparent payback period for the railroad, and diminish the significance of any increase in transportation cost experienced by the shipper relative to the "savings"

experienced by the railroad as the result of an abandonment. 3/ In short, if investment needs are overstated, artificial justifications are created for the carrier to abandon the line, or place it in the rail bank, rather than make the infrastructure investments that would be called for under the Board's financial analysis criteria and any reasonable interpretation of the common carrier obligation.

Once a line segment is placed in the rail bank, Board procedures leave it completely under the control of the original owner. The carrier is insulated against the need to make infrastructure investments for as long as it chooses, while being protected against the risk that the line would be acquired and operated by a competitor. For railroads that are being pressured by Wall Street to avoid making infrastructure investments, the "cold storage" option provided by rail banking is undoubtedly attractive in many circumstances, especially when compared to the market discipline envisioned in 49 U.S.C. §10905.

Unfortunately, the ability of rail banking under current Board procedures to shield railroads from a competitive response to abandonments is not limited to low-density branch lines. Past rail mergers have resulted in the rail banking of former main lines and trackage with considerable strategic significance. For PRB coal shippers like AECC, one of the most significant examples of this is the former Chicago & North Western (CNW) "Cowboy Line" across northern Nebraska. This line formed the heart of

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3/ If the savings that a railroad would achieve from an abandonment are less than the cost increases that would be imposed on shippers, approval of the abandonment likely would create an unsound economic condition that the Board has a mandate to prevent (under 49 U.S.C. §10101(5)) and that would be inconsistent with the public interest.

CNW's original plan in the late 1970's to construct what was then to be the second rail access to the PRB. After CNW entered its joint venture with UP that resulted in the construction of the Connector Line and the outlet of PRB coal to UP at South Morrill, NE, and after UP subsequently acquired CNW, most of the Cowboy Line was rail banked. Under the deference to the abandoning carrier enshrined in the Board's current rail banking procedures, UP exercises eternal veto power over any proposal to construct a new competing PRB rail line that would make use of any of the rail banked portion of the Cowboy Line, even though the Cowboy Line has been rail banked for approximately 15 years.

Given the private value that a railroad may place on excluding potential future competition, nothing in the Board's current rail banking procedures seems to prevent the possibility that a carrier, having presented evidence that a line has no economic viability, will nevertheless leave rail assets in place to support a rail banking agreement rather than liquidate those assets through abandonment. It would be difficult to reconcile such a practice with the encouragement of "honest and efficient management of railroads" pursuant to 49 U.S.C. §10101(9), and difficult to view it as anything other than the exercise by the carrier of an ability to exclude potential future competitors.

The abandonment statute very plainly favors Board intervention to sever control over a line by an abandoning carrier, and permits the line being abandoned to eventually be transferred to others without the permission of the original carrier. The Board's current implementation of rail banking enables railroads to circumvent this

competitive discipline. It provides the carrier with essentially all of the benefits of abandonment while also providing a shelter that prevents unused rail assets from falling into the hands of other railroads.

Section 8(d) of the Trails Act was enacted out of Congress' concern about the shrinking mileage of the national rail network, and created rail banking as a tool to preserve rail lines for future reactivation. However, the legislation is being used by railroads to eliminate trackage from their systems while retaining control over it that prevents its use by potential competitors.

B. Responses To Specific Questions

- *Has rail banking under Section 8(d) been a success for rail carriers and trail users?*

Rail banking has been a success in the sense that numerous line segments have been taken out of service and used for trails, and in theory those segments are "preserved" for future rail use. However, only a small number of those segments have actually been restored to rail use. As discussed in further detail in Section I.A (above), the detrimental effects of current rail banking practices on shipper transportation options, railroad competition, and the public interest may exceed their public benefits.

- *Have most rail corridors proposed for rail banking under Section 8(d) actually been developed into trails?*

This question is more directly relevant to the interests of the Secretary of the Interior and the Secretary of Transportation, who have partial responsibility for rail banking under Section 8(d), than it is to the interests of the Board. From the Board's perspective, the presence of a financially-qualified trail operator is the main

consideration in preserving a corridor for future rail use. If anything, the actual development of trail facilities complicates the future return of a line to rail use, as it typically involves the introduction of materials and structures that are inconsistent with rail use, and the development of constituencies that, notwithstanding the purpose of rail banking, would oppose restoration of the line to rail service.

- *Should the Board require notice or a copy of the Trails Act agreements to be submitted to the Board?*

  Yes, the Board should receive a copy of any and all agreements between the railroad and the intended trail operator pertaining to any given line segment, and should not issue a CITU or NITU unless it is satisfied that the agreements are consistent with the public interest and the purposes of Section 8(d). To the extent that the agreements address ownership, maintenance responsibilities, and salvage rights pertaining to track, bridges, etc., they may influence or determine the economic feasibility of the potential future restoration of rail use of the corridor, and thus fall directly within the Board's jurisdiction and responsibility. Likewise, a trail operator might seek assurances that the line will not be returned to active rail service for a specified period of time. While a rail carrier might be willing to enter a commitment of this type, the Board should be made aware of any such commitment, which would run contrary to the underlying public interest purpose of rail banking.

- *What can or should the Board do to further facilitate rail banking and encourage the restoration of active rail service on rail banked lines?*

As discussed in Section I.A (above), the Board should take steps to ensure that rail banking is not used by rail carriers to prevent the acquisition and operation of unused rail lines by prospective competitors.

- *Who should bear the cost to restore a rail corridor for rail service, including replacing any bridges that may have been removed during interim trail use?*

From the outset, it was recognized that it was not necessarily inconsistent with rail banking under Section 8(d) for track and other rail property to be removed from the line. In the Preseault case, the Supreme Court noted that "all railroad equipment, including switches, bridges, and track, [had been removed] from the [rail banked] portion of the right-of-way", 494 U.S. at 9, and in the ICC's first rule-making, the Commission assumed that rail would be salvaged from the rail banked line, 2 ICC2d 591, 1986 ICC Lexis at *20. Nevertheless, it is certainly the case that removal of such structures makes the eventual restoration of the line to rail service more difficult and expensive.

With respect to bridges in particular, the trail use agreement ought to spell out clearly the rights and obligations of the trail operator. If a trail operator surreptitiously removed a functional bridge or other structure that is integral to a rail banked line in violation of its contractual obligations, it should bear responsibility for replacing the bridge if rail service were restored. On the other hand, a line that is a candidate for abandonment (or rail banking) may have low traffic volumes, and may have been maintained to minimal standards prior to being taken out of rail service.

Indeed, as discussed in further detail in Section I.A (above), the Board's abandonment proceedings may overlook instances where rail management has unduly deferred infrastructure investment. If rail management decisions have contributed to the need to take lines out of service in the first place, it is difficult to envision how the Board could place on trail operators a greater responsibility for the stewardship of rail assets than it places on the railroads themselves. The operator of restored rail service certainly should not be entitled to send to the trail operator a bill for issues related to the condition of the line that existed prior to the interim placement of the line in trail use.

Even with the acceptance of this principle, issues surrounding restoration costs may become muddied with the passage of time. For example, maintenance practices that are appropriate for trail use may not forestall deterioration that would affect future rail use. The passage of time may also reveal latent defects in the condition of a bridge, and weather events, flooding, or other natural disasters that occur during the time of trail use may render a bridge unsuitable for future rail use. 4/

In general, and to the extent practical, the Board should assure that the responsibilities of the parties are spelled out in the trail use agreements.

- *How have reversionary property owners been affected by rail banking?*

Many reversionary property owners favor neither rail banking nor the future restoration of rail service. It is understandable that people who acquired

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4/ For example, long after the cessation of freight rail service, defects were discovered in the anchorage of the superstructure of the Kinzua Viaduct in Pennsylvania to its foundation. Despite partial repairs, the structure was destroyed in a subsequent tornado. See http://www.dcnr.state.pa.us/info/kinzuabridgereport/kinzua.html.

property without having an awareness of rail banking, interim trail use, and the possible future restoration of rail service may feel aggrieved. However, the solution should not involve undermining the rail network by hindering the return to rail use of needed rail assets. Indeed, the extent to which a given line generates a lot of NIMBY complaints from abutters and reversionary property owners is reflective of the extent of economic development in the area, and the need to preserve pre-existing transportation corridors (which otherwise may be difficult to assemble in developed areas).

In some cases, it appears reversionary property owners have seen rail banking as an opportunity to utilize property that formerly was occupied by a railroad. For example, AECC has seen instances where a city has paved over rail banked property and turned it into a city street. AECC has also seen situations where a property owner has expanded the footprint of a building into the path that would be followed by restored rail service.

Perhaps some of these property owners are not well informed about their responsibilities under rail banking, and the prospective return of the line to rail service. However, since there currently is no systematic inspection or enforcement of restrictions on rail banked property, adjacent or reversionary property owners seem to feel free in many cases to do what they wish with the property.

II. CONCLUSIONS AND RECOMMENDATIONS

While railroads may have a private agenda that favors a short-term view of infrastructure investments and permanent exclusion of competitors, the Board should ensure that the PC&N standard retains its statutory definition of "public

convenience and necessity", and is not reinterpreted to mean "private contribution and non-investment". The Board should apply increased vigilance to ensure that the abandonment process is used as intended to permit railroads to divest truly unprofitable assets, and not to enable the railroad to avoid consequences for withholding maintenance from lines that provide adequate contribution under the Board's standards.

Specifically:

1. The Board should review every Trails Act agreement to assure that it is consistent with the public interest and the purposes of the statute, and should not issue a CITU or NITU unless it is satisfied that it does so. Rail banking agreements should establish responsibility for monitoring the status and proper use of rail banked assets.

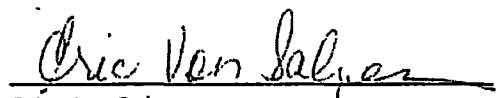
2. Once a line has been rail banked, Board rules should limit the period of time for which the original carrier maintains control over the return of the line to rail service. As is the case with OFA's, after a defined period of time the line should be available for acquisition by other carriers prepared to restore the line to rail service.

3. Proposals to bring property out of the rail bank for restored rail service should obtain expedited consideration and treatment from the Board and other federal agencies, particularly with respect to environmental issues. If rail banking is undertaken explicitly to preserve established rail corridors for future rail use, it would undermine the fundamental purpose of the program if environmental issues that would not have affected the original rail use of the corridor were permitted to restrict the restored use.

This overall approach would keep more lines in service, and compared to current practice would promote restoration of rail service for a higher proportion of lines that are rail banked. It would help to ensure that carriers properly fulfill their prudent management and common carrier obligations, and would make rail banking procedures harmonious with the Congressional intent that the Board act to free, and not conceal, rail assets that a carrier elects not to use in rail service. Otherwise, shippers will tend to experience unnecessary inconvenience and costs, and improper losses of potential transportation options. Such outcomes are inconsistent with the public interest, but can be avoided through Board review of its procedures governing the movement of rail assets into and out of the rail bank.

Respectfully submitted,

Arkansas Electric Cooperative Corporation



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